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NO. 81-2110

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN, and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NEW ENGLAND LEGAL FOUNDATION AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

In an effort to alleviate local unemployment, the City of Camden adopted an ordinance which absolutely excludes out-of-state workers from a minimum of 40% of all jobs in a major segment of the public and private construction industry in Camden, and limits those employment opportunities to persons who have been domiciled in the City for a continuous 12-month period.

1. Does the ordinance violate the protection afforded to nonresidents by the interstate Privileges and Immunities Clause to pursue their livelihoods in other states free from discrimination?

2. Does the durational residency aspect of the ordinance infringe upon the right to travel interstate, and thereby violate the Equal Protection Clause of the Fourteenth Amendment?

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MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

New England Legal Foundation, pursuant to Rule 36.1 of the Rules of the Supreme Court, respectfully moves this Court for leave to file its brief amicus curiae, bound with this Motion, in support of the Appellant.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation,

organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the economic and constitutional interests of the people and businesses of New England. NELF has long been interested and involved in the constitutional and public policy issues surrounding the proper roles of the states vis-a-vis the federal government and each other. The Foundation has consistently supported the proposition that it is essential to the maintenance of our Federal Union that no state, nor any of its political subdivisions, may possess the power to impose economic barriers to the free flow of interstate commerce, or to adopt protectionist measures designed to favor local residents at the expense of the citizens of its neighbors.

NELF has previously participated as an amicus party in Kevin H. White v. Massachusetts Council of Construction Employers, ___ U.S. ____, 51 U.S.L.W. 4211 (February 28, 1983), in

which a similar municipal residents hiring preference was upheld against a Commerce Clause challenge. NELF's brief amicus curiae therein argued the invalidity of the hiring preference for local residents under both the Commerce Clause and the Privileges and Immunities Clause of Article IV, section 2.

The amicus believes that equality of economic opportunity is a right fundamental to achieving the unity of purpose and freedom of enterprise which are central to our democratic form of government, and which are embodied in the Privileges and Immunities Clause of the Federal Constitution. The denial of employment opportunity based solely upon the circumstance of residence violates these vital constitutional guarantees.

The construction trades are particularly threatened by a residency-based hiring quota as is established by the City of Camden ordinance at issue herein. The business of construction relies

upon a work force which is both highly specialized and skilled and is necessarily mobile. Its mobility is dictated by the irregular nature of the work itself. And the limited availability of construction work within any single municipality requires the construction worker — particularly if a skilled specialty worker -- to commute to varying job sites which shift continually upon completion of each project. To impose a residency requirement upon a construction worker would eliminate a significant measure of his employment opportunities. And to demand of construction contractors a hiring quota based upon residence would necessitate a separate core work force in each locality, at an unavoidable increase in the cost of construction and at the inevitable expense of the quality of the finished construction project, all due to a mandate to hire with regard not to qualification, but to residence. The amicus opposes this intrusion upon long-recognized and vital constitutional guarantees.

For the foregoing reasons, New England Legal Foundation respectfully requests that this Court grant leave to file the accompanying brief in support of the Appellant.

By its attorney,

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BRIEF OF NEW ENGLAND LEGAL FOUNDATION, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

This brief amicus curiae is filed contingent on the allowance of the foregoing Motion for Leave to File said brief. The interest of the amicus curiae in this case is set forth in that Motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The interstate Privileges and Immunities Clause was intended "to help fuse into one Nation a collection of independent, sovereign States," Toomer v. Witsell, 334 U.S. 385, 395 (1948), by establishing a "norm of comity" in the treatment of the citizens of the several states, making nonresidence an improper basis for locating a special burden, Austin v. New Hampshire, 420 U.S. 656, 662 (1975). This policy of comity is of importance not only to individual rights to nondiscriminatory treatment, but also to the structural balance essential to the concept of federalism. Id. When the right of economic opportunity in the pursuit of a livelihood — a right held "fundamental" to the Privileges and Immunities Clause — is implicated, the Constitution places limitations upon the extent to which employment opportunities may be biased against a nonresident by reason of his nonresidency alone. Hicklin v. Orbeck, 437 U.S. 518, 525 (1978).

Only when nonresidents are shown to be a "peculiar source of the evil" intended to be remedied, and only when the discrimination practiced bears a "substantial relationship" to the evil nonresidents present, is a scheme discriminatory on the basis of residence permitted. Id. at 526-28.

In seeking to alleviate local unemployment by barring out-of-state workers from 40 percent of all public works construction jobs and a significant segment of the private construction market, the City of Camden has acted in clear violation of that fundamental principle of comity. It has attempted to isolate itself from a problem common to all states, protecting its own residents from competition by denying to nonresidents their right to compete on an equal footing in the Camden construction market.

The Camden ordinance at issue herein establishes a mandatory quota for the employment of City residents on every construction project for which the City "spends funds derived from any

public source," or where the City "confers a direct financial benefit" in excess of $50,000.00[1] On

[1] The grant of a property tax abatement is excluded. A 54-55. The ordinance is set forth in its entirety as Appendix C, at A36-58 (record references are to the Appendix to the Jurisdictional Statement herein). In relevant part it provides as follows:

> Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply....The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more. [A54-55].
>
> C. Developer/Contractor's Contracting Obligations.
>
> b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden. [A56].
>
> I. Definitions.
>
> 5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period

each such project at least 40% of the entire labor force must be City residents. Several points are worthy of note. First, the ordinance is without reference to job qualifications. Its requirements, therefore, must be met regardless of the level of skill of the job applicant. The contractor must hire according to the applicant's place of residence, and then presumably provide him the training necessary to render him of use on the workforce. The inevitable result of such a measure is to increase the cost of doing business for a contractor who performs work within the scope of the ordinance. Second, the measure applies on its face not only to public works construction projects financed solely

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Ftnote Continued

> of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the period of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence. [A38].

by the City, but also apparently to private development projects induced by federal "public" funds which the City merely administers, as well as to "the development and construction of all residential housing of four (4) units or more," A55, regardless of their funding sources.

Third, the 40% requirement is merely a minimum level of compliance. The developer/contractor must "make every effort" to employ local residents. A56. The effect upon nonresidents, therefore, is to foreclose the availability of at least 40%, and perhaps far more, of the affected employment opportunities. Fourth, the ordinance's application to "the entire labor force," A56, and to "all contractors and sub-contractors," A40, A46, extends its reach far beyond those parties immediately in contract with the City. Its impact is by no means limited to persons in some sense "employees" of the City. And fifth, the ordinance mandates not simply a preference, but a quota, a measure even more

intrusive of personal rights. A quota demands that a contractor affirmatively recruit employees satisfying the residence requirement, rather than merely give preference to a Camden applicant over an equally qualified nonresident.

This is not a case wherein a municipality is determining the dispensation of governmental benefits according to appropriately drawn distinctions. It is, instead, an instance of governmental intrusion into the contractual relationships between private parties, in order to carry out a purpose which is plainly protectionist of local economic interests. The City is choosing which persons, among the class of construction workers comprised of both residents and nonresidents, may compete for employment within a certain segment of the private construction industry. The ordinance requires that City residents be eligible for 100% of the construction jobs, while any nonresident of the City, including any nonresident of the State, is limited in

eligibility at most to only 60% of those positions.

While the Commerce Clause may provide no prohibition against such a restriction to the extent that it is applied strictly to wholly city-funded public works projects, White v. Massachusetts Council of Construction Employers, ___ U.S. ____, 51 U.S.L.W. 4211 (February 28, 1983), the interstate Privileges and Immunities Clause proscribes any such discriminatory scheme which fails the two-part test set forth in Hicklin. The City of Camden has offered no justification for singling out nonresident employees of the construction industry to bear the burden of alleviating the City's unemployment problems. Nor has it demonstrated the likelihood that its discrimination is appropriately drawn to accomplish that end.

It is clear that a state law, such as the New Jersey statute invalidated in Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 367, 437 A. 2d 733 (Ch. Div. 1981), which grants an

absolute job preference to state residents on all public works construction projects, violates the Privileges and Immunities Clause. To accept Camden's argument that it should nonetheless be immune from scrutiny when it adopts an ordinance designed to further that same end would allow the cities and towns of any state to accomplish what the state itself cannot. The ordinance can find no protection from constitutional attack in the fact that, by drawing a residence-based classification along city lines rather than state lines, it accomplishes an even greater discrimination.

The Camden ordinance is, moreover, repugnant to the equal protection principles of the Fourteenth Amendment. The City's 12-month durational residency requirement for eligibility for the construction jobs at stake distinguishes between its long-term residents and recent arrivals on the basis of the exercise of the fundamental right of interstate travel. Such a discriminatory provision must be judged according to the most

stringent measure of equal protection analysis. Zobel v. Williams, ____ U.S. ____, 102 S. Ct. 2309 (1982). The City has failed to establish a valid governmental interest sufficiently compelling and adequately served to justify the ordinance.

ARGUMENT

I. THE CITY OF CAMDEN'S ORDINANCE DISCRIMINATING AGAINST OUT-OF-STATE RESIDENTS ON THE BASIS OF THEIR RESIDENCY IS VIOLATIVE OF THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. The Privileges and Immunities Clause Was Intended to Provide Protection Against Unequal Treatment, Based upon State Residency, in Commercial Pursuits.

It has been an essential and overriding attribute of our national structure that there be explicit limitations upon the power of each state to create unnecessary distinctions between residents and nonresidents in the exercise of rights considered of fundamental importance to national citizenship. These limitations were inspired both by the concern for that social and political

cohesion necessary and "basic to the maintenance or well-being of the Union," Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 388 (1978), and by the desire to establish a free and unfettered national economy, in order to promote commercial productivity as well as to thwart "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

This principle of non-discrimination on the basis of residence finds its origins well prior to the creation of the Union itself.[2] In the Fourth of the

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[2] Varat, "State 'Citizenship' and Interstate Equality," 48 U. Chi. L. Rev. 487 n. 1 (1981): In 1976, even before the American colonies became States, a committee of the Continental Congress, appointed to propose articles of confederation, drafted two articles protecting the inhabitants of one colony from discrimination by another. See, Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 Wm. & Mary L. Rev. 1, 2-5 (1967). English law protective of "alien friends" is traced to the Magna Carta in R. Howell, The Privileges and Immunities of State Citizenship 9-13 (1918). According to Howell, by the time of the Articles of

Articles of Confederation, designed "to secure and perpetuate mutual friendship and intercourse among the people," the Framers sought to provide for a basic equality of treatment among the citizens of the different States with regard to

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Ftnote Continued

Confederation, "independently of any constitutional provision, the citizens of the thirteen original states were entitled to the enjoyment of a considerable class of privileges upon removal from their own to another State." Id. at 13. In his view, the constitutional provisions were drafted to extend the scope of these protections and render them more secure. Id. See also, L. Tribe, American Constitutional Law 427 (1978) (American tradition of "natural law" evolved during the 17th and 18th centuries, holding implied limitations upon governmental authority intruding upon "natural rights" reserved to the people); Note, "The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights," 33 U. Miami L. Rev. 691, 694-96 (1979).

individual rights and commerce.[3] In the area of individual rights, that anti-discrimination principle was later carried over into the comity article of the Constitution, in the Privileges and Immunities

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[3] Article IV of the Articles of Confederation provided:

> The better to secure and perpetuate mutual friendship and intercourse among people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

9 Journal of the Continental Congress, 908-909 (1777) (Library of Congress ed. 1907); quoted in Hicklin v. Orbeck, 437 U.S. 518, 532 n. 16 (1978).

Clause of Article IV,[4] in briefer form but with no change in substance or intent, unless "to strengthen the force of the Clause in fashioning a single nation." Austin v. New Hampshire, 420 U.S. at 661 (footnote omitted).

The interest in ensuring unrestricted trade among the states created another major impetus for the drafting of the Constitution, in part out of a recognition that the economic interests of the nation as a whole, and of each individual state as a consequence, lay in the establishment of such a truly national market. The Federalist, No. 11, (A. Hamilton) (J. Cooke ed. 1961) p. 71; see, id., No. 42, (J. Madison) p. 283; cited in Reeves v. Stake, 447 U.S. 429, 448 (1980) (Powell, J., dissenting). But the Framers were also concerned over the fractionalizing forces of economic competition

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[4] The Privileges and Immunities Clause holds that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, §2, cl. 1.

between the states, evidenced in discriminatory tax or regulatory burdens upon the commercial intercourse between them. Each state might, it was feared,

> pursue a system of commercial polity peculiar to itself [which] would occasion distinctions, preferences, and exclusions, which would beget discontent.... We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest. The spirit of enterprise, which characterizes the commercial part of America,...would [not likely] pay much respect to those regulations of trade, by which particular states might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations on one side, the efforts to prevent and repel them on the other, would naturally lead to outrages, and these to reprisals and wars. The Federalist, No. 7, (A. Hamilton) (J. Cooke ed. 1961) pp. 39-40 (emphasis in original); and see, id., No. 22, (A. Hamilton) p. 137; No. 42, (J. Madison) p. 283.

These principles have consistently informed judicial consideration of state action which establishes a discrimination between the commercial interests of in-state and out-of-state residents. As a result, a state law establishing an employment preference for in-state residents has been held violative of the Privileges and Immunities Clause, based upon the anti-discrimination and federalist principles found in case precedents both under that constitutional provision and under the "mutually reinforcing" Commerce Clause. Hicklin, 437 U.S. at 531-34.

B. The Privileges and Immunities Clause Applies to the Exclusion of Out-of-State Residents From a Major Segment of the Camden Construction Market.

It has long been recognized that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."

Ward v. Maryland, 12 Wall. 418, 430 (1870). What has become the modern understanding of the reach of the Privileges and Immunities Clause was first set forth in Toomer v. Witsell, 334 U.S. 385 (1948), in which a South Carolina law limiting commercial access by nonresidents to migratory shrimp within state waters was struck down. The Toomer Court began its analysis from a recognition that one of the privileges which the Clause guarantees to a nonresident is that of doing business within a state "on terms of substantial equality with the citizens of that State." Id. at 396. Federal and state courts have also applied the Privileges and Immunities Clause to strike down statutes which require higher costs for commercial enterprise by nonresidents, Mullaney v. Anderson, 342 U.S. 415 (1952) (license fees for commercial fishermen); which unnecessarily inhibit a nonresident's opportunity to engage in his chosen profession, Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D. N.H. 1982) (residency requirement

for applicants for admission to the bar), and cases cited; and which restrict the availability to nonresidents of employment in public works construction, Salla v. County of Monroe, 423 N.Y.S. 2d 878, 399 N.E. 2d 909 (1979), cert. den. sub nom., Abrams v. Salla, 446 U.S. 909 (1980); Neshaminy Constructors, Inc. v. Krause, supra; Mass. Council of Construction Employers v. White, 384 Mass. 446, 425 N.E. 2d 346 (1981), rev'd on other gr'nds sub nom, White v. Mass. Council of Construction Employers, ____ U.S. ____, 51 U.S.L.W. 4211 (February 28, 1983). While access to recreational hunting has not been considered a "fundamental" right, Baldwin v. Montana, supra, "a nonresident's right to pursue a livelihood in a State other than his own [is] a right that is protected by the Privileges and Immunities Clause." Id. at 386 (citations omitted). See also, Hicklin, 437 U.S. at 524, and cases cited.

C. That the Camden Ordinance Also Excludes Some New Jersey Residents, Or That it May Not Violate the Commerce Clause, Does Not Immunize it From Privileges and Immunities Clause Analysis.

The City argues that because New Jersey residents living outside Camden are excluded along with out-of-state residents from the construction projects subject to the City's ordinance, the ordinance should be considered immune from review under the Privileges and Immunities Clause. But the Privileges and Immunities Clause provides no basis for a distinction between the action of a state and the action of a municipality which is equally inimical to the purposes of the Clause.

By its very terms, the Privileges and Immunities Clause confers a personal right. It is not confined to discriminatory actions of a state, but ensures that no person shall suffer prejudice by reason of his state of residence. The purpose of the provision is "to place the citizens of each State upon the same footing with citizens of other

States, so far as the advantages resulting from citizenship in those States are concerned." Hicklin, 437 U.S. at 524; quoting Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).

There is nothing in the identity of a municipality, as distinct from a state, which renders its governmental actions any the less subject to federal constitutional provisions which set forth individual rights attendant upon national citizenship. The purposes of the Privileges and Immunities Clause are no less implicated when the discrimination is accomplished against out-of-state residents by means not of a state law, but of a municipal ordinance. When a municipality acts, it does so by virtue of the measure of state authority with which it is clothed. Its existence is purely derivative, as are the powers by which it governs. A city has no sovereign power, ours being strictly a "dual system of government." Parker v. Brown, 317 U.S. 341, 351 (1943).

> All sovereign authority "within the geographical limits of the United States" resides either with "the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." United States v. Kagama, 118 U.S. 375, 379 (1886) (emphasis added).

Community Communications Company v. City of Boulder, ___ U.S. ___, 50 U.S.L.W. 4144, 4147 (January 13, 1982). A city, like a county, is "the creature of the state exercising and holding powers and privileges subject to the sovereign will." City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923). "What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction." Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974).

If the state be powerless to enact a measure discriminatory against out-of-state residents, so also is its subsidiary. To hold the City of Camden to have the power to enact by ordinance a measure prohibiting all non-New Jersey residents from engaging in commerce within the City would be to grant the City a greater constitutional power than has its parent, the State. Such a holding would also enable a collection of similar ordinances by every municipality in New Jersey to accomplish the same result which by state statute would be deemed in violation of Article IV. The result would be both illogical and contrary to the principles motivating the Privileges and Immunities Clause.

Nor is it fatal to the analysis that the measure in question draws its discrimination not at the state boundary, but at the city line. Cf., Dean Milk Co. v. Madison, 340 U.S. 349 (1951). Were each city authorized similarly to enact preferential measures prohibiting out-of-city residents from a certain sector of employment, the effect felt by an

out-of-state resident would be no different than from a state-wide requirement. He is denied the opportunity to compete equally for employment simply because of his place of residence. In-state residents as a class stand in a preferred position with regard to any and all such city-drawn discriminations, as some in-state residents (those who are in-city residents) may qualify for every position, while out-of-state residents qualify for none of the restricted positions.

Moreover, out-of-state residents suffer from the same lack of political access to municipal decision-making as they do to state government. It is this absence of political accountability which has long been held an important consideration in enforcing the protections of the Privileges and Immunities Clause. Since burdened nonresidents are not represented in the legislative halls of the state imposing the burden, judicial acquiescence in schemes establishing special burdens upon nonresidents would compel them to seek redress

through their own state; but "to prevent retaliation was one of the chief ends sought to be accomplished by the adoption of the Constitution." Austin v. New Hampshire, 420 U.S. at 662-63, quoting Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 82 (1920). By making nonresidence an improper premise for locating a special burden, the Privileges and Immunities Clause implicates "not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism." Austin, 420 U.S. at 662. As great a threat is posed to that concept of federalism by a retaliatory measure enacted to neutralize the City of Camden's scheme — whether enacted state-wide by Pennsylvania or New York[5] or city-wide by Philadelphia or Wilmington — as if created in

[5] Maryland has, in fact, already enacted an openly retaliatory measure which prohibits public works construction employment to a resident of any state whose laws prohibit public works construction employment of Maryland residents. Md. Ann. Code, Art. 21, §8-503 (1981).

response to a discriminatory state law.

The limited exemption from Commerce Clause application established for a municipal residents hiring preference on entirely city-funded construction projects, White v. Mass. Council, supra,[6] provides no protection from Privileges and

[6] Based upon the record in White, the Court also found no Commerce Clause violation in the application of the hiring preference to federally funded projects, with whose regulatory requirements the Boston provision was held to "sound a harmonious note." 51 U.S.L.W. at 4213. The record herein provides no indication what federal programs are affected by the Camden ordinance, which on its face applies broadly to all projects on which the City "spends funds derived from any public source." A54. The ordinance would apparently, then, apply at least to those federal programs referenced in White. Whether the federal government may authorize the infringement of a personal right held fundamental under the Privileges and Immunities Clause is a question held in White to be unresolved. Id. at 4214, n. 1 (Blackmun, J., conc. in part). Congress is clearly without authority to enlist a state in a joint program which authorizes the state's violation of the Equal Protection Clause, Shapiro v. Thompson, 394 U.S. 618, 641 (1969), citing Katzenbach v. Morgan, 384 U.S. 641, 651 n. 10 (1966), and the same reasoning would seem to apply to the personal rights protected by the Privileges and Immunities Clause.

Immunities Clause analysis for the Camden ordinance. White served to define the implied contours of the dormant Commerce Clause, and not to interpret personal rights held fundamental under a specific constitutional provision. The Camden ordinance, moreover, by its reference to "the development and construction of all residential housing of four (4) units or more," A55, clearly extends its reach into the private construction market, an area which the decision in White does not immunize even from Commerce Clause scrutiny.

D. The Camden Ordinance Excluding Nonresidents from Publicly Funded Construction Jobs Fails to Pass Scrutiny Under the Privileges and Immunities Clause.

When the fundamental right of economic opportunity in the pursuit of a livelihood is implicated, the Privileges and Immunities Clause places limitations upon a state's power to bias those employment opportunities in favor of its own

residents. Hicklin, 437 U.S. at 525. In Hicklin an Alaska statute creating a hiring preference for qualified residents (as distinct from the Camden ordinance at issue herein, whose quota requirement offers no regard for qualifications) in construction work associated with the State's oil and gas resources was unanimously declared unconstitutional. Citing the two-part test first set forth in Toomer,[7] the Court held that there had been no showing that nonresidents were "a peculiar source of the evil" which the statute was enacted to remedy — namely, Alaska's high rate of unemployment. Moreover, even if that showing

[7] The South Carolina statute requiring a higher license fee for nonresident commercial fishermen was struck down by the Court in Toomer, as it created a discrimination based upon residence that was without substantial reason beyond the mere fact of nonresidence. The State failed to establish a sufficiently unique and demonstrable link between the state interests served and the discrimination practiced. The Court required something to indicate that nonresidents "constitute a peculiar source of evil at which the statute is aimed," and that practical and less restrictive alternatives are unavailable. Id., 334 U.S. at 398-99.

were to be accepted as sufficient, the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent. The across-the-board grant of employment preference to all residents, employed as well as unemployed, was not properly tailored to the statutory purpose of reducing unemployment. 437 U.S. at 526-28.

The Camden ordinance creates precisely the sort of residence-based bias of employment opportunities which Hicklin and its predecessors found to interfere with a personal right held fundamental under the Privileges and Immunities Clause. The City can satisfy neither part of the requisite two-prong test.[8] While the alleviation of local unemployment may be a legitimate local

[8] The burden of satisfying the test lies with the governmental entity which has created the residence-based discrimination. Hicklin, 437 U.S. at 526-27. See also, L. Tribe, American Constitutional Law 411 (1978).

concern, it is insufficient to justify a discriminatory scheme in the absence of any demonstration that out-of-state residents are a peculiar source of unemployment within the City. Salla v. County of Monroe, supra (state-wide employment preference on public works construction projects offends the Privileges and Immunities Clause).

There is no unique link, no "substantial relationship," Hicklin, 437 U.S. at 527, between the interest served and the discrimination practiced. The ordinance does not draw its quota in terms of unemployed residents, but only residents. If an employed resident should take a job provided to him by the mandated hiring quota, and leave behind a position not among those covered by the ordinance, or one from out-of-state, the unemployed resident gains no benefit. This type of untargeted employment preference was considered by the Hicklin Court to bely the stated purpose of alleviating unemployment. Id. at 527-28. The City

also touts the retention of economic benefits generated by expenditures of tax dollars, and the reward of those who funded them, but these are nothing more than impermissible state purposes descendent from the state ownership doctrine long ago discounted as an absolute justification for state action intruding upon fundamental individual rights. Hicklin, 437 U.S. at 528-29.

Not only is the ordinance poorly focused on its stated goals, it is in fact likely to result in consequences harmful to the economy and to consumers and taxpayers. Even as the ordinance causes a shift in unemployment to outside city and state boundaries, and discourages construction workers in the exercise of their constitutionally protected rights, it also inevitably results in higher costs of public construction because of fewer competitive bids, and increases costs for those contractors who actually perform work covered by the ordinance. The additional expense and inefficiencies created by the mandatory

employment of inexperienced and less qualified employees and the resultant organizational disruption and inconvenience, will necessarily increase costs to private developers subject to the ordinance, as well as to the City and, hence, its taxpayers. Cf., Salla, 423 N.Y.S. 2d at 882-83. The unavoidable impact of such a program is likely to be far more harmful to the economic plight of the City and its residents than would be a program designed to promote employment by providing job training, encouraging new employment opportunities, or even limiting available employment opportunities to those who are currently unemployed.

Far from creating a solution notable for its positive impact upon employment opportunities and its careful focus upon those most in need of its aid, the City of Camden has produced a prohibitory scheme whose blunderbuss approach favors all residents, whether employed or not, and disadvantages all nonresidents, regardless of their

own economic hardships. The consequences of the Camden ordinance, at least as to a significant percentage of construction employment opportunities, hardly advance the "norm of comity" which is the central purpose of the Privileges and Immunities Clause.

II. THE ONE-YEAR DURATIONAL RESIDENCY REQUIREMENT OF THE CAMDEN ORDINANCE PENALIZES THE FUNDAMENTAL RIGHT OF INTERSTATE TRAVEL, AND IS THEREFORE VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Camden Ordinance Infringes the Right of Interstate Travel, and the Appropriate Equal Protection Test is One of Strict Scrutiny.

The Equal Protection Clause of the Fourteenth Amendment prohibits action by state or local government tainted either by a distribution of benefits or burdens in a manner inconsistent with fundamental rights, or by a prejudice against a "discrete and insular" minority. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The Clause provides that no state shall "deny to

any person within its jurisdiction the equal protection of the laws." Amendment XIV, §1. In so doing it announces a fundamental principle, "that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." Takahashi v. Fish & Game Commission, 334 U.S. 410, 420 (1948).

Since the landmark exposition of the right to travel in Shapiro v. Thompson, supra, this Court has consistently held that durational residency requirements penalizing the fundamental right to travel interstate warrant the strictest form of judicial scrutiny under equal protection analysis. See also, Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hospital v. Maricopa County, supra.

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and

> breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Shapiro, 394 U.S. at 629.

The right to interstate travel, in the sense of the right to migrate with the intent to settle and abide, Memorial Hospital, 415 U.S. at 254-55, is penalized by a state-drawn discrimination which favors those who have chosen not to exercise that right. A durational residency requirement which prohibits certain citizens from receipt of welfare, Shapiro, from voting, Dunn, or from receiving medical care at county expense, Memorial Hospital, for reason of their recent exercise of the right to travel, will be struck down absent a legitimate and compelling state interest which the statutory scheme is drawn with precision to serve. Dunn, 405 U.S. at 343.

The City of Camden has prohibited from at least 40 percent of the employment opportunities all persons, whether bona fide Camden residents or

not, who have lived in the City for less than the one-year durational residency requirement. By requiring new residents to reside in the City for a fixed minimum period in order to be eligible for employment opportunities available on an equal basis to all other residents, the Camden ordinance triggers the equal protection test of strict scrutiny. Cf., Zobel v. Williams, supra.

The Camden ordinance is doubly suspect for its infringement of another right — that of employment opportunity — which, although not recognized as "fundamental" in the current trend of equal protection analysis, has long held a protected place under the Fourteenth Amendment. The right to work has been considered to be "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915). The history of this Court's prior consideration of that right has been set forth by Justice Marshall in dissent in

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 317 (1976):

> Whether " 'fundamental' or not, 'the right of the individual...to engage in any of the common occupations of life' " has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. [citations omitted.]... And in Smith v. Texas, 233 U.S. 630,... (1914), in invalidating a law that criminally penalized anyone who served as a freight train conductor without having previously served as a brakeman, and that thereby excluded numerous equally qualified employees from that position, the Court recognized that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." Id., at 641,... "Insofar as man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use

> his powers of mind and body in any lawful calling." Id. at 636,... [citations omitted]

The right to earn a living admittedly does not include the right to work for the government per se. Murgia, at 313. But the application by the court below of a minimal rational basis standard to the Camden ordinance, at A27-28, misapprehends the basis for the distinction drawn by this Court between bona fide and durational residency requirements. An appropriately defined and uniformly applied requirement of bona fide residency may be necessary to preserve a basic conception of the political community, Dunn, 405 U.S. at 343-44, and may therefore be permissible in the context of direct municipal employees. Cf., McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976), and cases cited. The Camden ordinance, however, presents two significant distinguishing characteristics. Not only does it reach far beyond immediate municipal employees, by requiring residency of a given

percentage of the entire construction work force, persons who are by no means perceived as representatives of the municipality in the way that police, fire, public school, and government employees are. But of even greater significance under established constitutional precedent, the durational aspect of the Camden ordinance renders it subject to a substantially more stringent equal protection analysis than the Court below provided.

B. The Camden Ordinance's Durational Residency Requirement Fails the Equal Protection Test of Strict Scrutiny.

The distinction drawn by the Camden ordinance between 12-month residents and those more recently arrived serves no valid governmental purpose sufficiently compelling to satisfy the requisite equal protection test.

The justifications suggested by the court below for the City's ordinance, at A27-28, are either ill served by its discrimination, improper, or of too little substance to warrant such an intrusion

into constitutionally protected areas. The employment goal of the ordinance may not even be achieved by its operation, much less achieved in a manner least likely to conflict with the fundamental right to travel. Unemployment of local residents may be remedied not at all, and if so merely by chance, by a requirement that local residents be hired regardless of their own current employment status. While there may be a valid local interest in upgrading human resources and in reducing unemployment, the residency requirement fails to do so except by deterring the in-migration of nonresident construction workers. The challenged provision offers no increase in the number of available employment opportunities; it simply limits the universe of those who may compete for them. Even if a state or municipal government were to attempt to ease its unemployment problem by forcing employers to discriminate against nonresidents — a policy whose constitutional validity is at best dubious — the

means by which it does so must be more closely tailored to aid the unemployed than is a measure granting an across-the-board preference to local residents regardless of employment status. Hicklin, 437 U.S. at 527-28.

Nor may a state or locality discriminate in the offer of public employment opportunities merely to save money, State v. Wylie, 516 P. 2d 142 (Alas. 1973), the "public coffer" theory which was rejected in Shapiro, 394 U.S. at 632-33. It is not city residents alone who contribute to the "public coffer" by means of sales, parking, and other taxes which apply to commuters. Note, "Municipal Employees Residency Requirements, and Equal Protection," 84 Yale L.J. 1684, 1698 (1975). The ordinance's hiring bias is not drawn to favor only those who pay state or local taxes. A recently arrived resident is as much a current contributor to the public fisc as is his 12-month resident neighbor, and the reward of citizens for past contributions is not a legitimate state

purpose. Zobel, 102 S. Ct. at 2313. There is, moreover, an inherent unfairness in requiring an employee, who provides a day's work for a day's pay, also to contribute to the economy of the city and to its tax base. Any governmental interest in such financial benefits "is slight compared to the important interference with [the employee's] private rights." Donnelly v. Manchester, 111 N.H. 50, 52-53, 274 A. 2d 789, 792 (1971).

CONCLUSION

Unemployment is an economic ill not of local, but of national proportions, and is not solved by governmental efforts to limit employment opportunities according to political boundaries. A state, or one of its political offspring, may not simply export its unemployment by mandating the hiring of its own residents, nor may it impose the burden of alleviating unemployment solely upon the construction industry.

The City of Camden, by absolutely excluding nonresidents from even competing for, at a minimum, 40 percent of the jobs in a major segment of the construction industry, has adopted a rule which not only discriminates on its face against out-of-state residents purely on the basis of their place of residence, but also imposes upon them a burden which strikes at the very core of the freedoms which the federal Privileges and Immunities Clause was intended to protect. And by discriminating in its treatment of residents against those of shorter tenure than 12 months, the Camden ordinance triggers a stringent equal protection analysis which it does not survive. The durational residency aspect of the ordinance fails to serve a compelling governmental interest in a manner least restrictive of constitutional liberties.

For the reasons stated hereinabove, the amicus curiae, New England Legal Foundation, submits that the judgment of the New Jersey

Supreme Court should be reversed, and that the Camden resident hiring quota should be declared unconstitutional.

Respectfully submitted,

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